MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—OPERATION AND EFFECT—EXCLUSIVENESS OF REMEDY PROVIDED—A recent case in New York presents, for the first time in that state, if not in the entire country, a judicial decision upon the liability of an employer to his employee for an injury arising out of and in the course of his employment, for which no compensation is provided in the act. The plaintiff, a driver in the employ of the defendant, was bitten by a horse in the ear and as a result, amputation of part of the ear was necessary. It was alleged that the horse was, to the knowledge of the defendant, vicious and accustomed to bite mankind. It was held that since the injury was not included in the schedules of the act, the right to recover for it remained as before the passage of the act.[1]

This decision, it is submitted, is undoubtedly contrary to the purposes of the act and prejudicial to its proper administration. The purpose of the various Workmen's Compensation Acts in the several states is to provide a just, reasonable and speedy compensation to the employee for all injuries which he has sustained as a result of his employment and which have a tendency to impair, either temporarily or permanently, his earning power. The acts are intended, on the one hand, to protect the employee from a prolonged and dilatory legal contest when the claim is well founded, and on the other hand, to protect the employer from the expense and annoyance of suits where there is no legal right of recovery. Not only has the employer been deprived of the defences of contributory negligence, voluntary assumption of risk and the negligence of a fellow servant, but his liability has been extended to all injuries resulting from the employment which reduce the earning power of the employee, regardless of the fault of either party. In return it is intended that he shall be relieved from liability for injuries which do not reduce the workman's earning power, as pain, suffering, disfigurement, *etc.*, even though incidental to the employment.

It is the last consideration which the Appellate Division of the New York Supreme Court has either failed to recognize or been unable to apply. Under the construction which it has put upon the New York Act, the workman gains a new right of immense value and gives up no part of his existing right, while the employer is subjected to a new and heavy burden without the slightest diminution of the old. The decision is likewise not in accord with the general canons of statutory construction as applied by the majority of the courts. The rule is well stated in two Wisconsin cases:[2] "The common rule as to construing legislation in derogation of the common law strictly against a purpose to change it has little or no

[1] Shinnick v. Clover Farms Co., 154 N. Y. Supp. 423 (N. Y. Sup. Ct., App. Div., 1st Dept., 1915).

[2] Milwaukee v. Miller, 144 N. W. 188 (Wis. 1913); Sadowski v. Thomas Furnace Co., 146 N. W. 770 (Wis. 1914).

application to the efforts to create a new system for dealing with personal injuries to employees." . . . "The conditions giving rise to a law, the faults to be remedied, the aspirations evidently intended to be efficiently embodied in the enactment, and the effects and consequences as regards responding to the prevailing conceptions of the necessities of public welfare, play an important part in shaping the proper administration of the legislation." [3] Michigan is the one state that has construed the act strictly as being in derogation of the common law.[4]

The principal case is an instance of the application of bad principles of law to a statute poorly drawn and unfortunately worded. Although even a liberal construction of the wording of the act might lead to the same conclusion, the decision cannot be supported upon the reasoning of the opinion. It seems best first to examine the case and its decision. Section 10 of the New York Act [5] provides: "Every employer subject to the provisions of this chapter shall pay or provide as required by this chapter compensation according to the schedules of this article for the disability or death of his employee resulting from an accidental personal injury sustained by the employee arising out of and in the course of his employment without regard to fault as a cause of such injury." Section 11 provides: "The liability prescribed by the last preceding section shall be exclusive." The court, in its opinion, said: "If the schedules do not cover the injury suffered by an employee, he does not fall within the purview of the act and cannot claim compensation under it. As to such an injury, therefore, the right to recover remains as it was before the act was passed."

The words "for which compensation is provided in the schedules of this article" have in effect been read into Section 10 of the Act so that now it virtually reads: "Every employer shall pay compensation according to the schedules for the disability or death of his employee *for which compensation is provided in the schedules of this article.* . . ." Section 11 provides that the liability prescribed in Section 10 shall be exclusive, but exclusive of what? By the reasoning of the court, it is exclusive "in all cases provided for by the schedules" and not "in all cases of injuries arising out of and in the course of the employment," as the purposes of the act demand that it should be construed. The schedules are for the purpose of determining the amount of compensation, not for the pur-

[3] See also Young v. Duncan, 106 N. E. 1 (Mass. 1914); Appeal of Hotel Bond Co., 93 Atl. 245 (Conn. 1915), "The statute is remedial in character, and its provisions are to be broadly construed in order to effectuate its purpose."

[4] Andrejwski v. Wolverine Coal Co., 148 N. W. 684 (Mich. 1914), "This statute being in derogation of the common law should be strictly construed, and that fundamental principle must be applied, although it is remedial and provides a remedy against a person who otherwise would not be liable."

[5] Laws of 1914, c. 41 (N. Y.).

pose of limiting the purview of the act to injuries for which compensation is provided therein. The result of the failure to appreciate this fact is that the employee is held to be within the act and subject to it only when he has received an injury for which he can be compensated under the act, and if no compensation is provided, his right to sue remains unchanged by the act.

Under similar reasoning and principles of construction, Section 12 of the Act which provides that "no compensation shall be allowed for the first fourteen days of disability" would be read to mean "no compensation *under the act.*" The workman is then enabled to sue in the courts for damages for injuries resulting in disability for less than a fortnight. This illustrates more clearly than the principal case that the reasoning therein is destructive of the very purposes of the act.

On the other hand, a proper reading of the statute renders it extremely difficult to avoid a similar result. The act provides that the employer shall pay compensation "for the *disability* or death of an employee" resulting from an injury arising out of and in the course of the employment. The New York Act is the only one of those examined which uses the phrase "*disability* or death." All the other acts read "for the *injury* or death." "Disability" means "loss of earning power" and is much narrower than the word "injury." There are many injuries sustained in the course of the employment as disfigurement, suffering, *etc.*, for which rights of action existed before the passage of the act, which are included in the word "injury," but not in the word "disability," which extends only to such injuries as reduce the workman's earning power. It immediately becomes clear that the act does not make any provision whatsoever for injuries arising out of the employment which do not result in a loss of earning power, but rather excludes them entirely from its operation. It is doubtful whether even a liberal application of the liberal canons of construction applied in the other states could remedy the defect.

In view of the preceding considerations, the provision in Section 11 that the liability in Section 10 shall be exclusive, can only be held to mean that the liability which is to be exclusive is the liability for disability or death and that it is exclusive of any other remedy for that disability or death. It is inconceivable, in view of the general scope of this class of legislation, that the legislature would have passed the act, had they known its true meaning. Such a construction of the act is to be regretted as it is evidently contrary to the intent of the legislature, but it is superior to that of the New York Supreme Court in that it prevents a misconstruction of Section 12, the section which provides for no compensation during the first two weeks of disability.

Curiously enough, the one other state which applies the strict rule of construction to this act, is also burdened with a statute which makes possible and in fact may compel a decision identical with

that of the New York court. The Michigan statute provides: "Any employer who has to pay compensation as hereinafter provided shall not be subject to any other liability whatsoever, save as herein provided, for the death of, or personal injury to, any employee, for which death or injury compensation is recoverable under the act." [6]

This question can never arise in the great majority of states, due to the express provision in the acts that the compensation provided for shall be the exclusive remedy for all injuries arising out of and in the course of the employment. The Pennsylvania Act provides: "Such agreement [to accept the provisions of the act] shall operate as a surrender by the parties thereto of their rights to any form or amount of compensation or damages for any injury or death occurring in the course of the employment or to any method of determination thereof, other than as provided in . . . this act." [7] The Connecticut Act provides: "The acceptance of this act by employers and employees shall be understood to include the mutual renunciation and waiver of all rights and claims arising out of injuries sustained in the course of the employment as aforesaid, other than rights and claims given by . . . this act." [8] The Minnesota Act is also a good example of the "exclusive remedy" clause as it should be drawn. [9]

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SURETYSHIP—WILL ADVANCE PAYMENTS DISCHARGE A SURETY? —A problem interesting theoretically, and practically of much importance, recently came before the highest court of Maine. While the facts of the case are by no means novel, being typical of several cases which have arisen under building contracts, in view of the somewhat confused state of the law on the subject, considerable importance attaches to the decision. The defendant had become surety on a bond given by a contractor to secure the performance of two construction contracts. By the terms of the contracts the contractor was to be paid on the fifteenth day of each month for the estimated value of the work done during the preceding month, less fifteen per cent of the amount, which was to be retained by the owners until the completion of the undertaking. Without the surety's consent a payment of five thousand dollars was made by the owner to the contractor twenty-one days in advance of the time when, under the contract, it became due. On the date when the payment was made, however, work exceeding in value the amount advanced, had been performed by the contractor since the last regular payment. It was

[6] Public Acts of Michigan, Extra Session of 1912, No. 10, part 1, § 4.

[7] Act of June 2, 1915, Laws of 1915, p. 736 (Pa.).

[8] Conn. Laws of 1913, c. 138, part B, § 1.

[9] Minn. Laws of 1913, c. 467, part 1, §§ 9 & 10. See also 102 Ohio Laws, p. 528 (1911); Wis. Stat. of 1911, c. 110 a, § 2394-4.